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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945,
No. 1145.

IN THE MATTER

of

A. L. HARTRIDGE COMPANY INCORPORATED,
Bankrupt,

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

against

BAYARD L. REISLEY, as Trustee in Bankruptcy of A. L. Hartridge Company Incorporated, Bankrupt,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

TABLE OF CASES CITED

STATUTES CITED

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Summary of Argument.

The Trustee's application for reconsideration of the order of April 14, 1942 and for the return of the money paid pursuant to that order, was timely. No principle of Bankruptcy Law is more firmly established than that a Bankruptcy Court may rehear any matter and vacate and modify its orders at any time before the Estate is closed and before rights have vested. The time limitations of Rules 59 and

60 of the Federal Rules of Civil Procedure are not applicable to orders in bankruptcy during the pendency of the bankruptcy proceeding. *There is no conflict in the decisions on this point.*

The Circuit Court of Appeals unquestionably had the *power* to entertain the Trustee's appeal, whether considered as an appeal from an order denying reconsideration or from an order denying an untimely petition to review.

The Trustee opposed the petitioners trust claim because of controlling decisions of the New York Court of Appeals. The Circuit Court of Appeals in upholding the Trustee in this respect *is squarely in accord with the only other decision of a Circuit Court of Appeals involving the identical question.* Moreover the question whether Section 36(a) of the New York Lien Law *now* creates a civil trust right can never arise as it has been disposed of in Amendments to the New York Lien Law effective September 1, 1942. *Hence no public interest or public policy is involved in the instant case.*

POINT I.

The Trustee's application for reconsideration was timely and was not barred by the time limitations of the Rules of Civil Procedure.

It is a firmly established rule of bankruptcy that a Bankruptcy Court has the right to rehear any matter and vacate or modify its orders at any time before the Estate is closed and before rights have vested. This Court so stated in the case of *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131.

The principle was restated by this Court in *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144 (November

1942) a case after the effective date of the Rules of Civil Procedure and the Revised General Orders in Bankruptcy;[1] at page 149:

> "Where a petition for rehearing of a referee's order is permitted to be filed, after the expiration of the time for a petition for review, *and during the pendency of the bankruptcy proceedings,* as here, they may be granted 'before rights have vested on the faith of the action,' and the foundations of the original order may be re-examined. *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137." (Italics ours).

The principle was followed in the case of *In re Morris,* 152 F. 2d 178, (C. C. A. 7, December 1945) where the Court upheld the right of the District Court to vacate in February 1945, orders which had been made in May and December 1941.

The reason for not applying the time limitations of the Rules of Civil Procedure to Bankruptcy Proceedings, may be found in the proposition that they do not apply to interlocutory orders or judgments and that all orders in bankruptcy are interlocutory until the estate is closed. *In re Chicago, M., St. P. & P. R. Co.,* 138 F. 2d 235 (C. C. A. 7, 1943; cert. den. 321 U. S. 770).

> "Since the proceedings and orders of a bankruptcy court are interlocutory until entry of the discharge, *Meyer* v. *Kenmore, etc., Co.*, 297 U. S. 160, 56 S. Ct. 405, 80 L. Ed. 557; *Shulman* v. *Wilson, etc., Co.*, 301 U. S. 172, 57 S. Ct. 680, 81 L. Ed. 986; *American United L. Ins. Co.* v. *Haines City,* 5 Cir., 117 F. 2d 574, and may be modified and rescinded before final decree, *Simmons Co.* v. *Grier Bros. Co.*, 258

[1] The Revised General Orders became effective February 13, 1939.

U. S. 82, 42 S. Ct. 196, 66 L. Ed. 475, if no intervening rights will be prejudiced, the court may grant a rehearing, *Wayne Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557."

American United Life Insurance Co. v. *Haines City Florida*, 117 F. 2d 574 (C. C. A. 5, 1941), at page 575:

> "We do not think, as appellant contends, the judgment confirming a plan is necessarily unalterable after ten days. Although it is by the statute made appealable, 11 U. S. C. A. §403, sub. e, it is in the same sentence and in several other places, called interlocutory. Like other interlocutory judgments it remains in a measure in the Court's control if not appealed from. Though the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, have by General Order in Bankruptcy 37, 11 U. S. C. A. following section 53, been made generally applicable to bankruptcy proceedings, the provisions of Rule 59 and 60 limiting the time for new trials and some other forms of review do not render interlocutory judgments final."

The oft cited case of *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82 where this Court upheld the right to rehear a determination with respect to the validity of a patent, made by interlocutory decree, although some three years had elapsed, was followed by this Court after the effective date of the Rules of Civil Procedure, in the case of *Marconi Wireless Co.* v. *United States*, 320 U. S. 1 (June 1943); at page 47:

> "Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 303 U. S. 26; 28 U. S. C. §288 (b), as are interlocutory orders of district courts in suits to enjoin infringement, 28 U. S. C. §227(a);

Simmons Co. v. *Grier Bros. Co.*, 258 U. S. 82, 89, the decision was not final until the conclusion of the accounting. *Barnard* v. *Gibson*, 7 How. 649; *Humiston* v. *Stainthrop*, 2 Wall. 106; *Simmons* v. *Grier Bros. Co., supra*, 89. Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins* v. *Fourniquet*, 6 How. 206, 208; *McGourkey* v. *Toledo & Ohio Central Ry. Co.* 146 U. S. 536, 544; *Simmons Co.* v. *Grier Bros. Co., supra*, 90-91."

The case of *Norris* v. *Camp*, 144 F. 2d 1, cited at page 18 of Petitioner's brief, involved an application to modify an order in bankruptcy, *some four years after the final decree had been entered and the estate closed.* Whether or not the time limitations contained in the Rules of Civil Procedure might bar relief in such a case has no bearing upon a case where application for relief is made *during the pendency of the bankruptcy proceeding.*

With respect to petitioner's contention that the Trustee was guilty of laches in applying for reconsideration, it should be noted that the application was based upon the ground that the Referee in making the order of April 14, 1942 had erroneously construed Section 36(a) of the New York Lien Law. This error did not become fully apparent until the decision of the New York Court of Appeals in the case of *New York Trap Rock Corporaton* v. *National Bank of Far Rockaway*, 293 N. Y. 884, a case relied upon by all of the Courts below (R. 27, 7, 20). However, that case was not decided until January 1945 and it was not until March 1945 that an application for rehearing was denied (294 N. Y. 691). It was in March 1945 that the Trustee made his application for reconsideration. Certainly that application

was timely. Indeed an earlier application might well have been premature.

It should also be noted that under the lower Court's decree of reversal the matter is remanded for determination as to whether Petitioner has changed its position since it received the $5,263.40 pursuant to the order April 14, 1942 (R. 27). Hence Petitioner is protected against damage by reason of the lapse of time.

POINT II.

The Circuit Court of Appeals unquestionably had jurisdiction of the Trustee's appeal.

The question which petitioner raises in his Point I, as to whether the Referee upon the application for rehearing, considered the order of April 14, 1942, on the merits, so as to extend the time to review, need not be argued in order to sustain the jurisdiction of the Appellate Court. Jurisdiction can be sustained either by considering the appeal as one from an order denying rehearing or from an order denying an untimely petition to review.

Regardless of language which appears in some cases, an order denying a motion for rehearing or reconsideration for mistake of law is subject to review (*Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474; *Wharton* v. *Farmers and Merchants Bank*, 119 F. 2d 487, C. C. A. 8). Indeed an order denying any motion for reconsideration or rehearing is subject to review for abuse of discretion. (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247; *Patton* v. *Lewis*, 146 F. 2d 544, 545, C. C. A. 10; *Powell* v. *Wumkes*, 142 F. 2d 4, C. C. A. 9; *Kimm* v. *Cox*, 130 F. 2d 721, 732, C. C. A. 8; *Rafert* v. *Equitable Life Assurance Society*, 138 F. 2d 185, 187, C. C. A 8, cert. den. 320 U. S. 801). The

Circuit Court of Appeals found an abuse of discretion in the instant case.

In any event the power to review is clearly sustained by the decision of this Court in *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144. In that case, as in the instant case, a petition for rehearing of an order in bankruptcy had been filed after expiration of the ten-day period for filing a petition to review. This Court held that while the filing of the petition for rehearing did not extend the ten-day period, the Court nevertheless had the *power* to review the order, a rehearing of which was sought; at pages 147, 151, 153:

> "The Court of Appeals affirmed the judgment on the grounds that 39(c) governed, that the time for review was not extended by the petitions for rehearing, that there was no basis for reversing the Commissioner's action on the petitions for review, and that the 'petitions for review were not filed in time.' We disagree with the Court of Appeals upon the last ground on the assumption that the language meant that the District Court was without 'power' to review the orders. * * *
>
> "Since the petitions for rehearing, in our opinion, did not extend the time for review, we are brought to examine the question as to whether §39(c), *supra*, note 2, is a limitation on the power of the District Court to act or on the right of a party to seek review. Courts of bankruptcy are courts of equity without terms. Commissioners, like referees, masters and receivers, supervise estates under the eyes of the court with their orders subject to its review. The entire process of rehabilitation, reorganization or liquidation is open to re-examination out of time by the District Court, in its discretion, and subject to intervening rights. Cf. *Wayne Gas Co.* v. *Owens-*

Illinois Co., 300 U. S. 131, 137; *Bowman* v. *Loperena*, 311 U. S. 262, 266. * * *

"The power in the bankruptcy court to review orders of the referee is unqualifiedly given in §2(10). The language quoted from §39(c) is rather a limitation on the 'person aggrieved' to file such a petition as a matter of right."

POINT III.

The lower courts correctly upheld the Trustee in opposing petitioner's trust claim under controlling decisions of the New York Court of Appeals.

The Trustee opposed petitioner's trust claim because of controlling decisions of the New York Court of Appeals which denied the existence of any such trust and not because of any judicial immunity from the penal consequences of his acts (Petitioner's Point IV). The case of *City of New York* v. *Rassner*, 127 F. 2d 703, cited at page 21 of petitioner's brief, involved the provision of the New York City Sales Tax Law which required the tax to be "paid by the purchaser to the vendor as trustee for and on account of the City". There was no question as to whether the State Statute made the vendor a trustee. The only question was as to whether the admitted trust right should take precedence over other administration expenses.

In our case the New York Court of Appeals has squarely held that Section 36-a of the New York Lien Law as in effect prior to the Amendments effective September 1, 1942, created no civil trust right. Whatever doubt may have existed from the decision in the case of *Raymond Concrete Pile Co.* v. *Federation Bank & Trust Company*, 288 N. Y. 452, has been finally resolved by subsequent decisions of the New York Court of Appeals. Petitioner does not even

refer to these subsequent decisions although they were relied upon by the lower courts.

In the case of *Raymond Concrete Pile Co.*, 288 N. Y. 452, decided July, 1942, a trust was claimed on behalf of unpaid materialmen in money received by a contractor for an improvement, deposited in the defendant bank and applied by the bank in payment of an obligation owed to it by the contractor, the bank having no knowledge that there were any unpaid materialmen or subcontractors. The Court of Appeals dismissed the complaint in an opinion which concluded as follows, at page 463:

> "In the only case in which the question was raised in this Court, we held that an individual claimant could not maintain an action under Section 25-a (*New York Trap Rock Corporation* v. *National Bank of Far Rockaway,* 285 N. Y. 825). We must now conclude that no civil representative action is created by that section and that it does nothing more than to bring an offender under that section within the coverage of Section 1302 of the Penal law."[2]

Reargument was granted and the original decision adhered to by the Court of Appeals in March, 1943 (290 N. Y. 611).

Despite the opinion quoted above, lower court decisions differed in cases where the bank or other party had knowledge of the claims of unpaid materialmen and unpaid subcontractors (compare *Saltser & Weinsier Inc.* v. *Monroe Plumbing & Heating Supply Corp.*, 265 App. Div. 821, 2nd Dept., with *New York Trap Rock Corp.* v. *National Bank of Far Rockaway,* 265 App. Div. 994, 1st Dept.) All doubts were set to rest by the Court of Appeals in the case of *New*

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[2] Section 25-a of the Lien Law is identical with Section 36-a except that the former deals with public improvements and the latter deals with private improvements.

York Trap Rock Corporation v. *National Bank of Far Rockaway,* 293 N. Y. 884 (decided January, 1945; reargument denied March, 1945, 294 N. Y. 691). That was a representative action by unpaid materialmen claiming a trust under the New York Lien Law in money received by a contractor for an improvement and paid to the defendant Bank in payment of the contractor's debt to it. The record shows that the bank had notice of the claimed trust at the time it received the money (First Department Records, Vol. 8240, pp. 12, 17 and 49). The Court of Appeals held as follows:

> "Judgment reversed and complaint dismissed with costs of all courts, on the authority of *Raymond Concrete Pile Co.* v. *Federal Bank,* 288 N. Y. 452."

This decision was foreshadowed by the decision in the case of *Saltser & Weinsier Inc.* v. *Monroe Plumbing & Heating Supply Corporation,* 290 N. Y. 903, decided June 18, 1943. There a trust was claimed by an unpaid materialman, in money received by a contractor for an improvement. The defendant claimed the money under an assignment made by the contractor in consideration of a debt owed by the contractor to defendant for work done on a construction job different from that for which the money had been paid to the contractor. The trust was asserted both under the Lien Law and by virtue of an express promise made by the contractor. Attorneys for the respective claimants held the money in escrow pending the outcome of the litigation. The materialman argued in the Court of Appeals that Section 36-a of the Lien Law created a trust of which it was a beneficiary and that the 1942 amendments to the Lien Law specifically authorizing a civil action were merely declaratory of pre-existing law. It was argued in opposition that Section 36-a of the Lien Law created no civil rights, citing

the *Raymond Concrete Pile Co.* decision. The Court of Appeals affirmed without opinion the judgment dismissing the complaint.

The Circuit Court of Appeals in sustaining the Trustee in the instant case is squarely in accord with the decision in *In re Edward Misch Co.'s Estate,* decided by the Federal District Court in Michigan, 34 F. Supp. 781 and affirmed on the opinion of the District Judge by the Circuit Court of Appeals for the Sixth Circuit, 112 F. (2d) 1007, a case ignored by Petitioner in its brief although cited by the Referee in his opinion. In that case a claimant in bankruptcy made application to have money in the hands of a bankruptcy trustee declared a trust fund for the benefit of a claimant materialman and others, the Michigan statute containing trust provisions similar to those found in the New York Lien Law as it existed prior to 1942. The District Court affirmed the order of the Referee, which had denied the relief requested, for the reason that the Supreme Court of Michigan had construed the statute as being penal in nature and not affording civil rights. At page 782:

> "Petitioner's contention that Act 259 of Michigan Public Acts of 1931 affords it the right to claim money in the custody of the Trustee, under the facts in this case presents solely a question of law. It appears to this Court that the construction placed upon the statute in question by the Michigan Supreme Court in the case of Club Holding Company *v.* Flint Citizens' Loan & Investment Company reported in 272 Mich. 66, 261 N. W. 133 is conclusive upon the question. In passing upon a State statute, this Court is constrained to give effect to the same in harmony with the decisions of the court of last resort of such State.
>
> The Michigan Court holds that the statute is a penal statute and as such, does not affect the civil

rights and obligations of the classes of persons mentioned therein.

The alleged right of petitioner involved in this controversy is solely a claimed civil right.

It therefore follows that the construction placed on this statute by the Michigan Court is too plain for further argument, and that an order may be entered herein confirming the Referee's order."

This decision was affirmed by the Circuit Court of Appeals on the opinion of the District Judge (112 F. 2d 1007).

Whether the New York Lien Law *now* creates a civil trust right has been settled by the New York State Legislature in its Amendment to the Lien Law effective September 1, 1942 (See page 23, Petitioner's brief). These amendments provide, as to improvements completed subsequent to September 1, 1942, a civil trust right which would be enforceable in bankruptcy or otherwise. We are at a loss to understand how Petitioner could make the statement, at page 7 of its petition, that the decision in the instant case "will adversely affect the construction industry". *In view of the amendments to the Lien Law, the question at issue can never arise again.*

Conclusion.

It is respectfully submitted that the petition for certiorari should be denied.

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